In the Supreme Court of Pennsylvania, 1861.

JEPTHA KILLAM *vs.* GEORGE KILLAM.

1. An estate already descended cannot be divested from the legal heirs, and given to the bastard child of an intestate, by a subsequent statute of legitimation; but the legislature may cure the taint of a bastard's blood for the purpose of future inheritance.
2. By an act of the Legislature, passed in 1853, it was provided that George *W.* K., son, and Emily M., daughter of *George* K., shall have and enjoy all the rights and privileges, benefits and advantages of children born in lawful wedlock, and shall be able to inherit and transact any estate whatsoever, as fully and completely to all intents and purposes, as if they had been born in lawful wedlock." The persons named were children of George K., in point of fact, by the same mother, who, after their birth, but before the passage of the act, had been married to a third person, X. At the date of the act all parties were living. George W. died in 1859, unmarried, and without issue, seised of land which had been conveyed to him by his father. In an ejectment by the father against a grantee of X. and his wife: *Held*, that the effect of the act of 1853, was to remove, for *all* purposes of inheritance, the defect of blood of the children, as though, at the time of their birth, their parents had been lawfully married; that the land passed, under the intestate laws of this State, to his natural parents for their joint lives, notwithstanding that the mother was then still the wife of X., remainder to his natural sister, Emily M., in fee; and therefore that the father was entitled to recover, but only as to an equal moiety of the land.
3. *Held*, also, that the case was not affected by the general law of 1855, which provides that the estate of a bastard, dying unmarried and without issue, shall pass to his mother absolutely.
4. *Held*, further, that the fact that the conveyance of the land in question to George *W.* K., by his father, was expressed to be in consideration of natural love and affection, was not material.

Error to Common Pleas of Wayne county.

The opinion of the Court was delivered by

WOODWARD, J.—The reason why a bastard cannot inherit, by the common law, is because he is the son of nobody. Having no ancestor, his blood possesses no inheritable quality; though in respect of his own children, it has the usual descendible quality of pure blood. But a bastard may be made legitimate and capable of inheriting, says Blackstone, and 4th Inst. 36, by the transcendant power of an act of Parliament, and not otherwise, as

was done in the case of John Gaunt's bastard children by a statute of Richard II. We have on our statute books acts of legitimation without number. Because our constitution is silent on the subject, the legislative power is plenary. I am not aware that it has ever been questioned. An estate that has already descended to the legal heir cannot be divested and given to the bastard by a subsequent act of legitimation; but that the taint of his blood may be cured for the purposes of future inheritance by the healing touch of the legislature, is not to be doubted. It is not so questionable an exercise of power as the restoration of inheritable blood by the reversal of an attainder for treason; for the corruption there proceeds from disloyalty to the State, which is a much more grievous offence than fornication.

The business now in hand, however, is not to vindicate the legislative power to restore bastards, but to interpret an act of legitimation. In 1853 the legislature enacted, "that George W. Killam, son, and Emily Miles, daughter, of George Killam, of Wayne county, shall have and enjoy all the rights and privileges, benefits and advantages of children born in lawful wedlock, and shall be able and capable in law to inherit and transmit any estate whatsoever, as fully and completely, to all intents and purposes, as if they had been born in lawful wedlock."

These are very large enabling words. The very definition of a legitimate person is one born in lawful wedlock, and whatever capacities to inherit or transmit an estate such a person possessed in 1853, or should acquire thereafter, were to belong to George W. Killam, and to be among his "rights, privileges, benefits, and advantages." So much is clear. But lawful wedlock with whom? The mother of George W. and Emily is not mentioned or referred to in the enactment. Whether they were children of the same mother, and who was the mother of either or both, the legislature seems not to have known or inquired. They meant undoubtedly that the children should have the same legal capacities as if their father had been at their birth the lawful husband of their mother, and it is fortunate that the construction of the act is rendered easier by the ascertained fact that they had a common mother.

Elizabeth Tyler was the mother of both. They were both born before 1821. After their birth, but long before the act of 1853, their mother was married to Nathaniel Tyler, and both she and the father, George Killam, survive both children. Emily married, and died in 1860, leaving a husband and three minor children. George W. died intestate in 1859, unmarried, and without issue, seized in fee simple of two hundred and eighty acres of land, the subject of the present controversy. In 1860, Tyler and wife conveyed the land to Jeptha Killam, with a full notice that it was claimed both by the father, George Killam, and by the sister, Emily Miles, then still alive. This ejectment was brought by George Killam, the father of the bastard, against Jeptha, the purchaser, from the mother of the bastards, and upon this state of facts the court so construed the act of 1853, as to give the judgment and the land to the plaintiff.

The necessity of defining the exact effect of the act of 1853, is shown by our general intestate laws, which provide for the succession to the estates of intestate children, whether they be legitimate or illegitimate. If legitimate, the real estate, by the 3d section of the act of 8th April, 1833, relative to intestates, goes to the father and mother of the intestate child during their joint lives and the life of the survivor; and by the 5th section to them in fee simple, "in default of issue, and brothers and sisters of the whole blood and their descendants." If the descendant be an illegitimate, then by the 3d section of the act of 27th April, 1855, his real estate goes to his mother in fee simple.

Was George W. legitimate or illegitimate, when he died in 1859? That depends on the effect of the act of 1853. If legitimate, then his father and mother, both being alive, take a joint estate for life in his lands, and his sister, being of full blood, took the remainder in fee, which at her death descended to her heirs. If, on the other hand, he was illegitimate, then under the act of 1855, his mother took the whole in fee simple.

The learned judge must have thought, as the counsel for the defendant in error argues, that after the act of 1853 the children ceased to be illegitimate only as "*between their father and them-*

selves." Notwithstanding the full and strong terms of that legislation, counsel will not agree that it legitimated the children any further than as concerned the one parent. To concede that it legitimated them as to both parents, would admit the mother to a joint inheritance. The immediate effect of such a qualified construction of the act must be to leave them illegitimate as to the mother, and then the act of 1855 brings her in. The only answer which the counsel make to the act of 1855 is, that George W. Killam was not, at its passage, of the class to which it applied. He had been created, say they, the legitimate son of his father by legislative enactment. He had been taken out of the inferior class of illegitimate, "and clothed with all the civil rights of the superior class of legitimate children."

The argument is manifestly *felo de se.* You kill your first position of a qualified or half legitimation, by your second, which invests the children with *all* the civil rights of legitimacy. The question here is not one of inheritance, but of transmission. George W. might have controlled the direction his estate should take by a will, but he elected to leave it to the transmission of the intestate laws. He must be presumed to have known what they were.

It is a truism, too simple to need more than mere assertion, that for the purposes of the intestate acts he must have been either legitimate or illegitimate. They provide for no mongrels or hybrids. Then let it be said that he was legitimate, that though not born in lawful wedlock, the transcendant power of the legislature has made him equal to a son born in lawful wedlock, that though his mother was not ascertained or mentioned by the legislature, she is fully identified by the parties litigant, and her maternity admitted in the record before us, and, therefore, that in legal judgment she should be recognised as entitled to a joint life estate with the defendant in error in the decedent's lands. What is the objection to this? It may be said it is giving undue effect to the act of 1853—that it is virtually making wedlock betwixt a man and a woman who is married to another man—that if the bastards had had several mothers, it would be marrying Killam to each of them, and that it estab-

lishes inheritable blood betwixt a brother and sister, as well as between a father and his children. Let all these consequences be accepted, and what do they amount to? Notwithstanding Mrs. Tyler's present wedlock, she might have been Killam's lawful wife when these children were born. The legislature were not necessarily guilty of an historical untruth, or even of an anachronism, in enacting that she was. A divorce would have qualified her for the second marriage. How do we know that these children were not born in lawful wedlock, the legislature having said they were? How can we impeach the union between the parents, whatever it was, since the legislature has made it lawful? And why should not the act be construed to make George and Emily brother and sister? It is judicially ascertained that they were children of the same father and mother, and they have been legislatively declared legitimate. They then were in law, as in fact, brother and sister of the full blood. As to the embarrassment which would be upon us if they had happened to have been born of different mothers, sufficient unto the day is the evil thereof. That question is not before us, and it shall not distress us.

The other construction of the act of 1853, that which qualifies the legitimacy granted, is not free from greater difficulties. It is opposed to the terms of the enactment, which is sufficient to set it aside. We have seen that the words used by the legislature were large enough to confer all the civil rights of legitimacy, and as it was a remedial and a humane law, it ought not to be cramped in the construction. But again; the intestate laws cannot be administered on the theory of a partial legitimacy. This is apparent enough from what has been already said. It is to be observed that when they admit the mother to the inheritance of a deceased child, whether a legitimate or illegitimate, they admit her not as the wife of the father, but as mother. It is of no moment, therefore, that Mrs. Tyler is not Killam's wife, since he confesses her to be the mother of his children. In that maternal character she takes under the intestate law. If the act of 1853 was intended for the very special purpose supposed by counsel, of establishing relations between the father and son in respect to the land in ques-

tion, how do they account for Emily being embraced in it, between whom and her father there were no transactions in land?

In view of the difficulties of both constructions, we think it more congenial to the spirit of our intestate laws, and more honorable to the motives of all parties, to impute to the act of 1853, not the narrow and inconsistent purpose contended for, but the more generous intent of eradicating all manner of taint from the blood of both George and Emily, and compelling the world to treat them, for all purposes, as legitimate. The consequence is, that George could transmit and Emily could inherit under the intestate laws as if no defect had ever existed.

We see nothing to change our judgment in the fact that this land was conveyed to George W. by his father for a consideration of natural love and affection. He held it as a purchaser, and at his death the fee simple descended to his sister, subject to a life estate of his father and mother for their joint lives, and the life of the survivor. By her the mother's conveyance to Jeptha Killam took what she held, and no more, and, therefore, the judgment should have been for the plaintiff below, not for the whole, but for a joint undivided moiety of the premises.

The judgment is reversed, and judgment is now entered here in favor of George Killam, the plaintiff below and defendant in error, for an undivided moiety of the land mentioned in the writ.

STRONG, J., dissents.

One of the most difficult questions in constitutional jurisprudence, is as to the extent to which civil rights may be affected by retrospective legislation. The fact that neither in the Constitution of the United States, nor in most of those in the separate States, is there any express provision to guarantee them against such interference, has often been observed upon with surprise. While personal liberty and personal security, and the obligation of contracts are guarded with care, other rights are left to depend to a great degree for their protection, upon what is at best but vague and doubtful language. As the right of private property is one of the chief bases of civil society, it might naturally have been expected that some clear and emphatic prohibition against legislation which should impair its integrity, would have found a prominent place in the organic laws of a congeries of republics. Even in the Code Napoleon, in which no great jealousy of the sovereign authority is to be expected, it is declared at the very outset: "*La loi ne dispose que pour l'avenir; elle n'a point d'effet retroactif.*"

(Cod. Civ. Tit. Prel., Art. I., Sect. 2.) And, while in the Roman law no limit could be admitted in practice, to the arbitrary power of the Prince, still, in theory, it was always received as a fundamental maxim, *Leges et constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari.*

Whether the absence of any general prohibition against the disturbance of private rights in our constitutions, is to be attributed to the same cause which made the Roman laws silent on the subject of parricide, because it was not deemed wise to admit the possibility of such a crime, or to an inherent difficulty in determining the just limits of retroactive legislation, it is not easy to say. It is certain that among the restrictions fixed by the constitution of the United States upon the powers of the States, there is none which prevents the passage of retrospective laws, however unjust or impolitic, except only where they would affect some existing contract, or attach to some previous act penal consequences, which it did possess when committed, for this is the only sense in which the expression "*ex post facto law*" is to be received. Calder *vs.* Bull, 3 Dallas, 388; Satterlee *vs.* Matthewson, 2 Peters, 413; Wilkinson *vs.* Leland, Id. 661; Watson *vs.* Mercer, 8 Peters, 110; Charles River Bridge *vs.* Warren Bridge, 11 Peters, 539; Carpenter *vs.* Comm., 17 How. U. S. 463; Bennett *vs.* Boggs, Baldwin C. C. 174. The self imposed limitations of the State constitutions are of course more extensive than this, but still, as a general proposition, the mere fact that a law is made to operate on past transactions, is not, by itself, sufficient to render it unconstitutional. Calder *vs.* Bull, 2 Root, 350; Comm. *vs.* Lewis, 6 Binn. 271; Schenley *vs.* Comm., 36 Penn. St. 57; String *vs.* State, 1 Blackf. 196; Fisher *vs.* Cockerill, 5 Monr. 133; Davis *vs* Ballard, 1 J. J. Marsh, 578; Locke *vs.* Dane, 9 Mass. 360; Oriental Bank *vs.* Freese, 18 Maine, 112; Wilson *vs.* Hardesty, 1 Maryl. Ch. 66; Goshen *vs.* Stonington, 4 Conn. 218; Lockett *vs.* Usry, 28 Geo. 349. Even if it could be considered to this extent, as a violation of the principles of natural justice, a court could have no power, on that ground alone, to declare it void: Comm. *vs.* McClosky, 2 Rawle, 514; Lord *vs.* Chadbourne, 42 Maine, 441. But retrospective legislation, so far from being a necessary infraction of those principles, may often operate in furtherance of equity, good morals, and social order, and where it does so, will generally be sustained, if obnoxious to no express constitutional restriction: Trustees of Cayuga Falls, &c., Academy *vs.* M'Caughy, 2 Ohio St., N. S. 152; Goshen *vs.* Stonington, 4 Conn. 218; Savings Bank *vs.* Allen, 28 Conn. 102. Indeed, in those States where such legislation has been prohibited in terms, the constitutional provision has received a judicial construction which deprives it of almost any special value, by admitting in practice, substantially the same exceptions, as are elsewhere allowed as qualifications of a mere principle of political justice: Merrill *vs.* Sherburne, 1 New Hamp. 199; Woart *vs.* Winnee, 3 Id. 474; Clark *vs.* Clark, 10 N. H. 386; Gilman *vs.* Cutts, 23 Id. (3 Foster) 382; Willard *vs.* Harvey, 24 Id. (4 Fost.) 344; Rich *vs.* Flanders, 39 N. H. 313; Hoge *vs.* Johnson, 2 Yerg. 125; Vansant *vs.* Waddell, Id. 260; Brandon *vs.* Green, 7 Hump. 130; Society *vs.* Wheeler, 2 Gallison, 139; De Cordova *vs.* City of Galveston, 4 Texas, 477.

In determining, then, the validity of a legislative act, something more is usually to be looked at, than its effect on past transactions. In fact, the test will be found to be, in general, not whether the particular statute is or is not retro-

spective in its language; but whether it affects injuriously pre-existent rights of property. It must be observed, that the word "injuriously" is used here in its proper sense, as involving the idea of hurt or damage, not sanctioned or excused by any established rule of law or morals. For there are many ways in which rights of property may be abridged by legislative action, which, as possessing such sanction or excuse, is free from constitutional objection. Thus, in the exercise of what is commonly called the right of eminent domain, (for want of a better name,) the State, through its legislature, may impair, qualify, or destroy private property for a public benefit or to prevent a public injury. This right of eminent domain, which, like the right of self-preservation in individuals, is inherent in the very essence and constitution of civil society, precedes and sustains all private rights, towards which it may be said to stand in the relation of the keystone to the arch. Under this head may be classed laws which authorize the construction of public improvements, police laws which regulate the use of private property, so as to prevent detriment to the public morals or safety, tax laws, which control the application of private property to the support of the government, military laws, which sanction its appropriation to the general defence and security. With respect to these laws, and others of a like character, it is usually provided that compensation shall be made to the individual specially affected, but they are really justified as being the exercise of a paramount and pre-existent right, and therefore causing only *damnum absque injuria*. The same may be predicated of a great variety of legislative acts, which for purposes of general utility modify the incidents of private property; this, indeed, it is scarcely possible for any public statute to avoid doing, in an indirect manner at least. Thus, a law which restricts the testamentary power, if future in its operation, is nevertheless perfectly constitutional, and yet it deprives every citizen, to that extent, of a right which he previously possessed as the owner of property.

These phrases, public use, general utility, and the like, must be considered as indefinite (and so far objectionable) forms of expression for the legitimate and declared objects of civil government, as established in the particular State. Any interference with private rights, except for the necessary attainment of these objects, is therefore, in so far injurious in the proper sense of the word, as being founded upon no paramount right. It may, of course, be also injurious, though professedly directed to that end, by reason of some express restriction in the constitution of the State upon an otherwise paramount right. Now, the power of the judiciary to declare a law void which interferes injuriously with private rights, on one or other of these grounds, may be considered as universally admitted under our system of written constitutions, with its division of political functions. But, if the decisions on this subject are examined with care, it will be found that judges have differed to a very embarrassing extent, as to the exact ground on which their authority is to be rested. This has probably arisen from the influence of two conflicting theories of political government which prevail in this country. One of these, carried to its fullest extent, claims for the State, acting through its different departments, absolute and despotic power, except so far as this is expressly limited by the written constitution. The other, carried to its fullest extent, declares the State to be no more than a political corporation, established

like any other corporation, for definite ends, however exalted in their character, and beyond these, having no just power on the rights of individual citizens. Between these two extremes there are, of course, a variety of shades of opinion. Those who hold by the despotic theory, generally look only to the express restrictions on the legislative authority. The others regard as well the general scope of the constitution, and the supposed purposes for which it has been established.

It has been already observed, that in most of the State constitutions there is no clause which in precise terms covers this subject. The admitted restriction on the legislative power over private rights, is sometimes inferred simply from two well-known provisions, which are usually placed in the bill of rights, as controlling not merely the legislature, but every function of government. *First:* That no man shall be deprived of his property, "except by the law of the land, or by the judgment of his peers," which means the same as the other form in which it is sometimes expressed, "by due process of law:" Case of John and Cherry St., 19 Wend. 676; Brown *vs.* Hummell, 6 Barr, 36; Dale *vs.* Metcalf, 9 Barr, 110. *Second:* That private property shall not be taken for a *public* use without compensation, from which it is inferred that it cannot be taken in any case for a *private* use. See case of Albany street, 11 Wend. 151; Sadler *vs.* White, 34 Alab. 311; Clarke *vs.* White, 2 Swan, 549. An inference of the opposite character, that private property might lawfully be taken for a *private* use without compensation, was once drawn by Chief Justice Gibson from this very clause, see Harvey *vs.* Thomas, 10 Watts, 66, and as a mere matter of verbal logic, his conclusion was as just as the other. But it was unnecessary for the decision of the case before him, and has been expressly reprobated in other cases. Sharpless *vs.* The Mayor, 21 Penn. St. 167; Hays *vs.* Risher, 32 Penn. St. 177; Sadler *vs.* White, 34 Alab. 311.

It cannot be denied, however, that desirable as it may be to extract from these two clauses a sufficient prohibition against legislative interference with private rights, the task is one which involves a considerable latitude of interpretation. The first clause is simply copied in terms or substance from Magna Charta, where it originally stood as a limitation on the executive power, and it has never been supposed in England to apply practically, or otherwise than as the solemn enunciation of a principle of abstract justice, to the legislature. Or, if the question be confined to the mere construction of language, without regard to its historical derivation, we make no perceptible advance. Every statute *is* "the law of the land," unless restrained by some constitutional provision; and to convert a declaration that no man's property shall be taken *except* by the law of the land, into such a restriction, is a mere *petitio principii*, unless we are justified by *some other* constitutional principle, abstract or special, in giving to general words a limited and peculiar signification. It is plain, therefore, that this clause standing by itself, amounts really to nothing. Nor are we helped much more by the other clause which prohibits the taking of private property for *public* use without *due compensation*. From these naked words, three distinct and conflicting inferences may be drawn with equal logical propriety: (1.) That private property *can* be taken for a *private* use: (2.) That it *can* be taken for such use, only on compensation made: and (3.) That it *cannot* be taken for such use in any case. The first of these, which goes on the common

rule of construction, *inclusio unius exclusio alterius*, met, as has been noticed, the approbation of so sound a reasoner as Judge Gibson. The second, which operates by way of analogy, was adopted in Brewer *vs.* Bowman, 9 Geo. 37. The third, which applies the maxim *omne majus continet in se minus*, is the most common construction. It is sufficient to say, in respect to the last, that it also involves a *petitio principii*, unless we have first established that public and private uses stand to each other in the relation of *majus* to *minus*, for this particular purpose, since in themselves they are merely correlative and co-ordinate terms, mutually exclusive, and not in any obvious sense subordinated the one to the other. In other words, as it is contrary to the rules of logic to reason directly from particular to particular, we are thrown back on considerations of a more general character, which must be deduced otherwise than from the language employed. It is the ordinary case of statutory silence, which does not act as is own interpreter. And finally, as the clause is usually relegated to the bill of rights, it creates a restriction not only on the legislative power, but on the judiciary and the executive. The negative inference to be drawn from it, therefore, has no single effect, but must be applied distributively to the subjects of its positive prohibition. The result of this is, that it is, *a priori*, impossible to determine (even assuming that a negative inference is here admissible) which of the functions of government it really affects. To put this in a more tangible shape, if the clause provided that neither A, B, nor C, should take private property for public uses, what positive inference could be drawn from this that B could not take it for other uses?

But while a fair analysis of these special constitutional provisions seriously affects the validity of the conclusions often drawn from them, the argument based on the general scope and purpose of our written constitutions, as usually framed, possesses, it is submitted, much greater strength than is sometimes attributed to it. It is not necessary for its application that we should adopt either of the extreme theories as to the nature and extent of the powers vested in the State, which have been noticed above. Whether these powers, taken in the aggregate, are absolute or limited, their functions have been vested in three distinct branches of government. By this division of powers the function of the legislature is as much restricted to its appointed sphere as that of the judiciary, or of the executive. The fallacy lies in attributing to the first, in the absence of any express constitutional prohibition, the same absolute and unconditioned power, which is supposed by some to be vested in the State itself, as an abstract body. This has naturally arisen from our familiarity with the theory of the English Parliament, which does rightfully exercise that power to its fullest extent. But here a determination of what constitutes the true sphere of legislative action, must precede the discussion of the validity of any particular statute. That this is a task of very great difficulty there can be no doubt; but it is an imperative one, unless we are content to allow the legislature to convert itself into a practical tyranny.

For the present purpose, it is sufficient to assume, as beyond dispute, that the constitutional function of the legislature cannot coincide, to any material extent, with that of the judiciary; and, therefore, that to establish the possession of a particular power by the one is to deny it to the other. Now, one of the primary duties of the judiciary is to determine, upon

any given state of facts, what rule of law is to govern the rights of individual citizens. That this is generally done in the course of litigious proceedings, is an accident dependent on the mode in which the function is exercised. The rule itself, once ascertained, binds not merely the parties to the suit, but the community at large. But at any one time, and with reference to the same state of facts, there can be only one rule of law applicable; what that is may be more or less difficult of discovery, may sometimes be mistaken, but in its essence it is a pre-existent absolute fact, which can be no more made otherwise than it is, by human agency, than any other fact belonging to the past. The function of the judiciary is therefore the declaration of pre-existent law, and it is, *ex necessitate*, an exclusive one, for if any other body could exercise the same function, then there might be, as to the same state of facts, two conflicting rules of law, either co-existent, which is absurd, or that declared by the judiciary being abrogated by the other, which would make the judicial power a subordinate branch of government, which it is not.

Again, legislative power, in the proper sense of the word, consists in the authority to establish general rules of civil conduct, and this can of necessity apply only to future transactions. For the rights arising out of any past state of facts, must have become fixed by reference to some then existing rule of law. Now, those rights can only be destroyed in one of two ways: either by abolishing the existence of the rule, of which they are the consequence, *as a historical fact*, which is impossible; or by preventing their exercise by superior force, which would not be an act of legislation, but of arbitrary power. In other words, a statute which professes in terms to take away a pre-existent right, does not prescribe a rule of civil conduct as such, nor establish any principle to govern the action of the individual: for the action or conduct by which he acquired the right, being a part of the past, is now irrevocable. Such a statute is not really a law, but only an expression of the will of a majority in the legislature, under the pretended form of law. If that majority be not in fact restricted to the mere function of legislation, but possesses arbitrary power, as is to a great degree the case with the British Parliament, and was in every sense so with the French revolutionary convention, such an expression of will, whether calling itself a law, or a decree or an edict, would be valid and efficacious, however objectionable on moral grounds. But with us, to affirm the possession of arbitrary power by the legislature beyond the limits of its special function, is impossible. If it were so, the judiciary and the executive would cease to be co-ordinate branches of government. Even if we can attribute such power to the State in its original and organic character, nevertheless it has chosen by the constitution to delegate it to and divide it between several departments, and it would be as much a contradiction in terms to speak of three arbitrary powers co-existing in the same State, as of three infinite quantities occupying the same space. One must, *ex vi termini*, exclude or subordinate the rest.

To sum the argument up — Every statute which interferes with a vested right, must do so either by the enunciation of a rule of law to be applied to a pre-existent state of facts, which would be an encroachment on the judicial power; or by the arbitrary destruction of the right itself, which could never be a legislative act. In the one case, it would be the excessive exercise of an existing power; in the other, it would

be the assumption of a power which did not exist. In either case, the judiciary, in the exercise of its constitutional functions would be bound to declare what was the proper rule of law, and to enforce practically the rights which proceed therefrom, without regard to such an unconstitutional expression of the legislative will.

This mode of considering the general question, besides what seems to be its greater logical accuracy, possesses several advantages over that which claims to deal only with the construction of the two special clauses above referred to. In the first place, it deprives those clauses of the isolated and negative character which they would otherwise possess. It enables us to define "the law of the land," to be that rule of law which the judicial power shall declare to be applicable to any given state of facts. It further explains the reason for an express prohibition against taking private property for a public use without compensation. For every private right, as has been already said, is, from the very constitution of society, subject to the paramount and pre-existent right of the State to modify or even destroy it, when the public necessities, the attainment of the primary ends of government, shall require it. The exercise of this paramount right by the legislature would not be an encroachment on the judiciary, inasmuch as it would not be the application of a new rule of law to a previous state of facts, but only a declaration of the manner in which a pre-existent rule is applied to a new state of facts. As then, a law taking property for a public use would not be objectionable on any general constitutional ground, it was proper to qualify the right by a declaration, which abstract justice required, that the individual should in all cases be compensated for his sacrifice for the general good.

Again, the construction contended for will justify more clearly an universally admitted exception to the unconstitutionality of retrospective laws, in favor of statutes which merely operate on "the remedy," as it is called. The procedure established by law to enforce a right, is no part of the right itself, which often exists without any practical remedy, and most often without any need to call on the State for active assistance. This procedure is essentially of a transitory and prospective character; it is only the performance of the duty of the State to give an efficient protection to civil rights. So long as that duty is substantially performed, the individual has no cause to complain, and the mode of its performance, as a matter belonging to the future, may be varied from time to time, at least before it has incorporated itself with a right in proceedings actually instituted.

Finally, a number of exceptional and at first sight, anomalous cases, some of which will be presently mentioned, can by this means be co-ordinated and brought under the dominion of intelligible principles. Admitting that the main test of the constitutionality of a retrospective law, is, whether it avoids interference with the judicial power, it is plain that laws which merely confirm antecedent rights, remove obstacles to their just exercise, supply defects in the procedure by which they are to be established, and in general terms substitute an adequate for an inadequate remedy for their enforcement, cannot be obnoxious to objection on this ground. It is more difficult to determine to what classes of antecedent rights those principles can properly be applied. It certainly may, to those which would have a clear legal existence but for the positive interference of some rule of public policy or convenience, or but for the mistake or accidental non-observance of

such a rule. It may also apply to some cases of rights resting in moral obligation alone, such as those arising out of domestic relations existing *de facto*, though not lawfully established, an example of which may be found in the preceding decision. But there is a large and undefined class of cases, which deal with rights which are purely *in foro conscientiæ*, where it must be admitted that it is often very hard to discover any satisfactory grounds of decision. To take one man's property and give it to another, merely because we think he deserves it, may suit the character of a beneficent khalif, but not that of a civilized legislature; and yet there are reported cases which almost seem to go to that length. It would be impossible, however, from want of space here, to enter more fully on this subject. It is sufficient to indicate lines of distinction, which may be readily followed out by the student for himself.

Having thus stated in a general manner the principles upon which the constitutional question has been discussed, with more or less of clearness and consistency, we shall briefly consider some of the instances in which they have been practically applied by the decisions, among which there is fortunately much greater uniformity of result than of theory.

It may be taken to be settled, on whatever ground, that vested rights of property cannot be arbitrarily destroyed or affected by the legislature. Dash *vs.* Van Kleeck, 7 Johns. 505; Officer *vs.* Young, 5 Yerg. 322; Hoke *vs.* Henderson, 4 Dev. 15; Allen *vs.* Peden, 2 Car. L. Rep. 63; Dunn *vs.* City Council, Harper's Law, 199; Woodruff *vs.* State, 3 Pike, 302; Oriental Bank *vs.* Freese, 18 Maine, 112; Austin *vs.* Stevens, 24 Maine, 529; Wright *vs.* Marsh, 2 Greene, Iowa, 118; Houston *vs* Bogle, 10 Ired. 504; Holden *vs.* James, 11 Mass. 403. Lamberton *vs.* Hogan, 2 Barr, 24. And as this cannot be done directly, neither can it be done indirectly, as by the express repeal of a statute under which those rights are held. Benson *vs.* Mayor, &c., 10 Barb. 223. Or through a legislative construction of the statute by a subsequent declaratory law. Hunt *vs.* Hunt, 37 Maine, 334; Houston *vs.* Bogle, 10 Ired. 504; McLeod *vs.* Borroughs, 9 Georgia, 216; Wilder *vs.* Lumpkin, 4 Geo. 212; Dash *vs.* Van Kleeck, 7 Johns. 508; Ogden *vs.* Blackledge, 2 Cranch, 272; West Branch Boom Co. *vs.* Dodge, 31 Penn. St. 285; Gordon *vs.* Ingram, 1 Grant's Cas. 152.

The most obvious instance of interference with vested rights would be an act which in terms took away one man's property to give it to another. It is scarcely conceivable that such a statute could be deliberately passed, without some supposed excuse or palliation; but if it were, it would indisputably be disregarded by the judiciary. Jackson *vs.* Ford, 5 Cowen, 350; Wilkinson *vs.* Leland, 2 Peters, 658; Allen *vs.* Peden, 2 Carolina Law Rep. 63; Hoke *vs.* Henderson, 4 Dev. 15; Dunn *vs.* City Council, Harper, 199; Bowman *vs.* Middleton, 1 Bay, 254; Woodruff *vs.* State, 3 Pike, 305; Hoye *vs.* Swan & Lessee, 5 Maryl. 244; White *vs.* White, 5 Barb. 484; Austin *vs.* University of Pennsylvania, 1 Yeates, 260; Van Horne's Lessee *vs.* Dorrance, 2 Dallas, 304, 310; Pittsburg *vs.* Scott, 1 Barr, 314; Lamberton *vs.* Hogan, 2 Barr, 24; Brown *vs.* Hummell, 6 Barr, 86. But the same effect is often produced by legislative acts which have an apparent justification in the reasons on which they are founded, and in the ends which they propose to attain. Now, if we eliminate those cases in which the property is taken for a public use, or by way of punishment for some alleged

offence, which are governed by distinct constitutional provision, we have left those in which it is taken simply for a private use. This last class of cases, with which alone we have to deal, may again be divided into those where the right of property affected is absolute and complete, and those where it is imperfect, or qualified by some antecedent duty or obligation enforced by the statute, or where, though perfect in itself, it happens to be vested in some one not legally capable of exercising the usual and necessary functions of ownership.

Taking this division as sufficiently accurate for the present purpose, it may safely be said, in the first place, that an act which deprived one man of an absolute and complete right for the benefit of another, has rarely been sustained, however consonant it might seem to be under the circumstances with abstract justice. Thus, a statute which provides that the executors of a tenant for life shall be entitled to claim against the remainder-men for the value of permanent improvements made by the former, is unconstitutional so far as it applies to improvements made before its passage. Austin *vs.* Stevens, 24 Maine, 529; see Society *vs.* Wheeler, 2 Gallison, 139. So of a law which authorizes towns to make ordinances giving liberty to all their inhabitants to pasture their cows on public highways, the soil of which belongs to private individuals. Woodruff *vs.* Neal, 28 Conn. 165. So in some of the States, laws authorizing the taking of land for private ways, mill dams, and the like, have been held unconstitutional. Taylor *vs.* Porter, 4 Hill, 140; Clack *vs.* White, 2 Swan, 549; Sadler *vs.* Langham, 34 Alab. 311; see Brewer *vs.* Bowman, 9 Georgia, 37; *contra* Hickman's Case, 4 Harr. Del. 581. But in Pennsylvania, lateral railroad laws have always been supported; in the later cases on the ground that, being intended for the development of the mineral and other resources of the State, the taking of the land under such acts was really for a *public* use. Harvey *vs.* Thomas, 10 Watts, 63; Harvey *vs.* Lloyd, 3 Barr, 331; Shoenberger *vs.* Mulholland, 8 Barr, 154; Hays *vs.* Risher, 32 Penn. St. 169. It must be admitted, however, that the line of distinction between public and private uses, if this qualification were generally adopted, would be exceedingly thin.

It is not material, in the application of the general principle, whether the right of property affected was originally created by contract or other act of the party, or through the operation of some general law which at the time regulated the descent or transmission of property. Where the title to land has become vested by the death of an intestate, in his heirs, according to the then existing law, it can no more be divested by any general or special legislation than if they had taken by purchase. Thus, where a will is void by reason of a non-compliance with some statutory provision with respect to the mode of its execution, it cannot be validated after the death of the testator, by a confirmatory act, so as to vest the property in the devisees. Greenough *vs.* Greenough, 1 Jones, 489; McCarty *vs.* Hoffner, 23 Penn. St. 567. So where the act makes that devisable which was not devisable at the testator's death, such, for instance, as rights of entry for condition broken. Doe d. Southard *vs.* Central R. R. of New Jersey, 2 Dutcher, 13; see Mullock *vs.* Souder, 5 Watts & S. 198. So where a particular devise is inoperative, by reason of incapacity in the devisee, as in the case of a gift to an unincorporated institution for charitable purposes, a statute vesting the property in trustees for those purposes is void. Green *vs.* Allen, 5 Humph. 170. The same principle applies to statutes legitimating

bastards, which, though valid during the lifetime of the putative parent, are void if passed after his death, so far as they would affect the succession to his property. Norman *vs.* Heist, 5 Watts & Serg. 171; and it has even been held that it is not material that the act by which such a result is attempted, is one which only professes in general terms to validate past marriages by a legislative construction of a previous statute. Hunt *vs.* Hunt, 37 Maine, 337. The status of legitimacy or illegitimacy is determined by the death of the parent, and cannot be subsequently affected. *Id.* But this last decision is in conflict with the case of Goshen *vs.* Stonington, 4 Conn. 209, which will be subsequently referred to.

To this class may also be referred statutes affecting the rights of property arising directly from the relation of husband and wife. It has therefore been held, in some cases, that the "Married Women" acts of several of the States, cannot be constitutionally applied to the rights of a husband in the real estate or in the personal estate of his wife, whether in possession or action. Norris *vs.* Boyea, 3 Kern. 288; Westervelt *vs.* Gregg, 2 Id. 202; Holmes *vs.* Holmes, 4 Barb. 295; White *vs.* White, 5 Barb. 484; Lefever *vs.* Witmer, 10 Barr, 505; Bachman *vs.* Christman, 23 Penn. St. 162; Burson's Appeal, 22 Id. 166; Stehman *vs.* Huber, 21 Id. 260. In other cases a somewhat different doctrine has been maintained. Thus, it has been held that the legislature may constitutionally divest the contingent right of a husband in the chose in action of his wife. Clarke *vs.* McCreary, 12 Sm. & M. 347. And so it has been held, that though a statute cannot take away the vested rights of dower or courtesy, it can those which are merely inchoate. Strong *vs.* Clem, 12 Ind. 37 These cases cannot, however, be properly said to be conflicting, inasmuch as the character of the marital rights at common law in the different States varies very materially. Thus, where, as in Pennsylvania and elsewhere, the right of a husband over the choses in action of his wife is an immediate one, capable of positive and efficient exercise at any time, and in any substantial manner, and only subject, if not exercised, to the contingency of the survivorship of the wife, (see Hill on Trustees, 3d Am. Ed. 619, note,) or where the title by dower or courtesy is one which actually and as an estate in the land commences in the lifetime of the parties, it would be difficult to maintain the constitutionality of a law which simply abrogated their existence. But where, as in other States, the marital rights become vested only at the death of the husband or wife, a different doctrine might very properly obtain.

It may be observed, before leaving this branch of the subject, that where the natural succession to property fails by default of those who, by reason of blood or affinity, fall under the usual designation of heirs, the right of the State by way of escheat is one partaking of the nature of sovereignty, which cannot be bound by any antecedent undertaking. It therefore seems that where the State, by a general law, makes a specific disposition of property to which it might, under such circumstances, become entitled, that disposition may afterwards be changed in any particular case before the right under the general law has become vested by office found. This seems to follow from the case of Gresham *vs.* Rickenbacker, 28 Georgia, 227, though the decision there is somewhat rested on the language of the statute involved.

Passing now from the cases in which the right affected was previously absolute and complete, we may consider

briefly those in which it was already qualified by some antecedent duty or obligation, which the obnoxious statute is intended to enforce. Of course, it must be assumed that this duty or obligation was one for which originally the law furnished no practical remedy, else the statute would be a mere matter of supererogation.

Under this head may be classed those cases where, by contract or otherwise, and according to the very intention of the parties, a perfect legal right would have been created, but for an accidental disregard or omission of some formal statutory requisite to its juridical establishment. Thus, statutes validating deeds, the acknowledgments of which have been defectively certified by the officer taking them, have been frequently held to be constitutional, even as against married women and their heirs. Barnet *vs.* Barnet, 15 Serg. & R. 73; Tate *vs.* Stoolfoos, 16 Serg. & R. 35; Watson *vs.* Mercer, 8 Peters, 88, aff'd S. C. 1 Watts, 330; see observations in Menges *vs.* Dentler, 33 Penn. St. 499; Chestnut *vs.* Shane's Lessee, 16 Ohio, 599; Dulany *vs.* Tilghman, 6 Gill & Johns. 46. After an express decree or judgment of a court, indeed, it has been held, in some cases, to be different, as the matter has then become *res judicata.* Barnet *vs.* Barnet, 15 Serg. & R. 73; Gaines *vs.* Catron, 1 Hump. 84; Garnett *vs.* Stockton, 7 Hump. 84; but in Watson *vs.* Mercer, *ut supr.*, it was expressly decided that the validating act might be applied to a subsequent ejectment between the same parties; and see Satterlee *vs.* Matthewson, 16 Serg. & R. 169, aff'd 2 Peters, 413, to the same effect. The same rule has been applied to statutes intended to cure a mistake in the deed of a feme covert, as the omission of her name in the granting part. Goshorn *vs.* Purcell, 11 Ohio St. N. S. 644. Or to validate the defective exercise of a power. State *vs.* The City of Newark, 3 Dutch. 196. Or to set up and confirm leases and other contracts void as being against some special rule of public policy. Satterlee *vs.* Matthewson, *ut supr.*; Hess *vs.* Werts, 4 Serg. & R. 356; Savings Bank *vs.* Bate, 8 Conn. 505; Savings Bank *vs.* Allen, 28 Id. 102. The same may be said of statutes confirming irregular executions in favor of a purchaser. Mahler *vs.* Chapman, 6 Conn. 54; Beach *vs.* Walker, Id. 190; see Underwood *vs.* Lilly, 10 Serg. & R. 101; McMasters *vs.* Comm., 3 Watts, 294; Willard *vs.* Harvey, 24 N. H. 310. Though where a sheriff's sale is absolutely void, so that no title whatever passes, there being no contract or other obligation resting on the defendant, a confirmatory act will be invalid. Dale *vs.* Medcalf, 9 Barr, 110; Menges *vs.* Dentler, 33 Penn. St. 495. And, finally, the general principle above stated has been applied to acts confirming marriages *de facto*, really intended to be solemnized by the parties, but which, by mistake or ignorance of some statutory regulation, are void in law. Goshen *vs.* Stonington, 4 Conn. 209. This, it is true, was only a settlement case; and it appears, moreover, to be opposed by Hunt *vs.* Hunt, 37 Maine, 334. But it would seem that the doctrine of Goshen *vs.* Stonington, may be supported on the ground that the forms prescribed by law for the solemnization of marriage must, in general, be considered not as belonging to the *substance* of the contract, but as establishing the legal mode of proving it; and that if the parties really meant marriage, and cohabited together in good faith under that ostensible relation, an act which supplies the defect of form should be treated as affecting only the *evidence* of a right, and not the right itself. This distinguishes the case from that of acts legitimating bastards, where

the parents never actually contemplated marriage.

The last class of cases to which reference need be made on the present occasion, is that where a perfect legal right to property exists in persons who, by reason of some disability, such as that of infancy, coverture, or lunacy, are incapable of exercising the ordinary functions of ownership themselves, or of consenting to their vicarious exercise by others. Statutes which, unless such circumstances authorize the sale or pledge of the property in order to raise money for the necessities of the real owner, or because the property is burthensome or unproductive, have very frequently been passed, and almost as often sustained by the courts, at least where the application of the money produced, as directed by the statute, will not otherwise alter the rights of the party. It is plain that this does not attach any new or different incidents to the right of property; it merely removes a temporary bar to its complete and beneficial enjoyment. The disabilities we have above referred to are, to a great degree as to their substance, and entirely so as to their extent, the creations of positive law; and they are qualifications not of a right, but of the means of its exercise, introduced from motives of general policy, or for the protection of the individual. Their withdrawal or suspension in any particular case, when the reason of their enforcement has ceased, is, therefore, plainly no interference with the judicial power, and it is, moreover, a proper legislative act, for it is a mere modification of previous legislation. This power of supplying the defective capacity of its citizens, indeed, is inherent in the State, and constitutes what, in the Roman law, was called its *auctoritas*. This in the true sense of the word is that which *auget, i. e.*, which increases or supplies, the juridical power or *status* which is wanting in one not *sui juris*. The absolute necessity of the existence of such a function somewhere is apparent, and though it is usually delegated in a qualified manner to the guardian, husband, or committee of the person affected, it is not a natural but a derivative power; and if derived, as it must be, from the State alone, it proves the antecedent existence of the function itself as a branch of the legislative power.

The questions which have arisen under this head of our subject are of much importance, and they have given rise to some conflict of decision. Our limits, however, will prevent our entering upon them here; indeed they deserve of themselves a special study. It is sufficient to say that the general principle, as we have just stated it, will be found to be substantially supported by the following among other authorities: Eslep *vs.* Hutchman, 16 Serg. & R. 435; Norris *vs.* Clymer, 2 Barr, 277; Sergeant *vs.* Kuhn, Id. 393; Kerr *vs.* Kitchen, 17 Penn. St. 438; Martin's App., 23 Id. 437; Cochran *vs.* Van Surlay, 20 Wend. 365; Leggett *vs.* Hunter, 19 New York, 445; Fowle *vs.* Finney, 4 Duer, 104; Blagg *vs.* Miles, 1 Story, 426; Rice *vs.* Parkman, 16 Mass. 326; Davis *vs.* Johannot, 7 Metcalf, 388; Snowhill *vs.* Snowhill, 2 Green Ch. 20; Spotswood *vs.* Pendleton, 4 Call, 514; Dorsey *vs.* Gilbert, 11 Gill & Johns. 87; Nelson *vs.* Lee, 10 B. Monr. 495; Carrol *vs.* Olmsted, 16 Ohio, 251; Doe *vs.* Douglass, 2 Blackf. 10; Daws *vs.* State Bank, 7 Ind. 316. In Wilkinson *vs.* Leland, 2 Peters, 627, a statute confirming the sale of property of infant heirs by an executrix, *in order to pay debts* of the decedent, was held valid. But this was under an act of the Legislature of Rhode Island, which, at the

time, had no regular constitution, and the decision, as the enunciation of a general principle, was dissented from, in Jones' Heirs *vs.* Perry, 10 Yerg. 70, where a similar act was held void, on the ground that the legislation, not being for infant's benefit, but for the payment of debts to be ascertained, it was an exercise of judicial power. Where the persons, whose land is to be sold, are *sui juris*, however, the reason, and, therefore, the right, of legislative interference ceases, unless in cases where their assent is expressly shown: Ervine's Appeal, 16 Penn. St. 256; Schoenberger *vs.* School Directors, 32 Penn. St. 34; Kneass' Ap., 31 Id. 87; Powers *vs.* Berger, 2 Selden, 358. Though after the lapse of a great number of years, and acquiescence in a sale made under such an act, the assent of such persons may be presumed, at least in a controversey between strangers: Fullerton *vs.* McArthur, 1 Grant's Cas. 232. H. W.

In the Massachusetts Supreme Judicial Court, January Term, 1861.

LE BRETON *vs.* PEIRCE, THE OWNERS OF PROPERTY, ETC.

If the owners of property have intrusted it to an agent for a special purpose, and the agent, in violation of his duty, has unlawfully consigned the same to be sold, with directions to remit the proceeds to a private creditor of his own, and such creditor, upon being informed by a letter from the consignee of the consignment of the property and directions in reference to the same, manifests his assent thereto by unequivocal acts, and the property is sold by the consignee, and bills of exchange, payable to the agent's creditor or his order, are purchased with the proceeds, and remitted in a letter addressed to him, in compliance with the directions, and the creditor, after receiving notice of the intended remittance, and after manifesting his assent thereto, and after the remittance is actually made, but before it is received, learns for the first time of the manner in which the agent became possessed of the property, and of his wrongful acts in reference to it, the original owners of the property cannot maintain an action for money had and received against such creditor, to recover the amount collected by him upon the bills of exchange.

This case is reported at length in the October number of the LAW REGISTER, to which we must refer the reader. The Court, MERRICK, J., in giving judgment, put the case mainly upon the two points referred to in the following note, which was intended to have been published in the same number with the case.

One of the questions involved in this case is of great interest with business men; and it seems almost incomprehensible how there should have been so much conflict in the decisions of the courts in this country in regard to it.